November 1, 2015

Sent by email regarding Notice of Request for Comments Regarding a Proposed Franchise Commentary on Financial Performance Representations

Mr. Dale Cantone, Chair
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Dear Mr. Cantone and Mr. Staley,

Thank you for giving us the opportunity to comment on proposed Financial Performance Representations (FPR) commentary. FRANdata has been a strong advocate of FPRs for many years. Today the majority of franchisors actively seeking prospective franchisees have some type of FPR in their FDD. Having clear guidelines of what is acceptable and not misleading is a good objective. FPRs have a meaningful impact on prospective franchisees, lenders, and other stakeholders.

While clarity and guidelines that protect against misleading interpretations are laudable, it also is important not the establish guidelines that constrain the flow of helpful information to these stakeholders. Franchising is a constantly evolving business model with many different nuances being used by franchisors. More FPR information and flexibility in what franchisors can provide should be encouraged and needs to be weighed against the risk of some information being misconstrued or misleading.

We believe most of the commentary makes good sense and we commend you for identifying reasonable solutions to potentially misleading FPRs. However, there are several proposed commentary sections of which we respectfully suggest modifications as follows:

19.4 Franchisors often use company-owned outlets to test modifications in an existing program offering or to develop a new model. This should be encouraged as it puts program and model experimentation first on franchisors in a proof-of-concept approach. However, if franchisors are prevented from showing the financial results of such testing, then you are de-facto discouraging them from taking that responsibility. We suggest using a “substantially similar unit” test if this approach is applied because it more closely resembles your position in 19.5.

19.6 This section is problematic on several levels. First, determining the definition of “material” is difficult and certainly creates the potential for legal disputes in the absence of more clarity. Further, including operational as well as financial differences make it even more difficult. A “material in the aggregate” doesn’t provide sufficient substance to the potential variations. As one example, how would a franchisor assess the financial and operational implications of having a full-time HR department vs. a franchisee who might handle that function entirely on his/her own? In concept we support the position of allowing a franchisor to provide company-owned outlet P&L information even when there are operational franchisees. One reason is that many franchisors do not have such information for their franchisees due to cultural or operational decisions made years ago.

19.7 Taking the position that a franchisor that has company unit P&L information but no franchised units cannot use company unit information in an FPR implies that for the first year or two every franchisor that begins franchising is asking prospective franchisees to take a gamble on financial performance. That seems fundamentally wrong. Prospective franchisors should be encouraged to test their offering before asking prospective franchisees to take a risk. By preventing them from sharing their results is contrary to that logical business philosophy. The real issue here is understanding the differences between the financial performance of a company unit and a franchised unit. You have identified the obvious factors that are material in 19.6. Most, if not all, of those factors are known before the first franchised unit is operational – franchisee royalties, marketing fees, franchisor shared company unit costs such as management and back office operations and so forth. A franchisor may not know the actual franchisee costs for some operations before having operational franchisees, but those line items can be identified and most that can’t be specifically identified are likely to be non-material. We think the greater risk is preventing such information for prospective franchisees to consider.

All the other sections make good sense to us. Since we have been in the franchise research and analysis for a quarter of a century, we do believe we are in a good position to make such comments. Our objectivity on such matters is an integral part of our brand value.

Respectfully submitted,

Darrell M. Johnson

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Chief Executive Office